No. 84-1181

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IN THE

Supreme Court of the United States

October Term, 1985

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

BENIGNO CLASS,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR THE PETITIONER

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Question Presented

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BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the New York Court of Appeals (A. 55)* is reported at 63 N.Y.2d 491, 483 N.Y.S.2d 181, 472 N.E.2d 1009 (1984).

Jurisdiction

The judgment of the New York Court of Appeals was entered on November 27, 1984 (A. 53). The petition for a writ of certiorari was filed on January 18, 1985 and certiorari was granted on April 1, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

* Numerals preceded by "A." refer to pages of the Joint Appendix.

Constitutional Provisions Involved

Amendment IV of the United States Constitution provides:

> "The right of the People to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV of the United States Constitution provides:

> Section 1 ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

Statement of the Case

On May 11, 1981, in the late afternoon, Police Officers Lawrence Meyer and William McNamee observed respondent driving above the speed limit in a car with a "broken" windshield (A. 11-12, 13, 16, 21, 22, 23).* The officers drove alongside respondent's 1972 Dodge Charger, as he came to a halt at a traffic light, and ordered him to pull the car over (A. 12, 13, 14-15, 21, 23, 24). After complying with this directive, respondent emerged from his vehicle and approached Officer Meyer, the driver of the police car (A. 12, 15, 21, 24). Although he furnished the police officer with a registration certificate** and proof of insurance, respondent was unable to produce a driver's license because he was, in fact, unlicensed (A. 12, 15, 28, 31, 36).

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* Respondent was issued traffic summonses for driving a vehicle with a broken windshield and driving without a license (A. 19).

** The car was not respondent's, but belonged, as it was learned later, to his brother-in-law (A. 32).

Meanwhile, Officer McNamee, who had gone directly to respondent's car, opened the door to inspect the vehicle identification number (VIN), frequently located on the door jamb of older model cars (A. 12, 15, 21, 24-25). Unable to find it there, however, the officer turned his attention to the top of the dashboard, but was prevented from inspecting the dashboard VIN by looking through the windshield from without because a piece of paper obstructed the VIN plate (A. 21, 25). Reaching inside the vehicle to move the piece of paper, Officer McNamee saw not only the VIN, but the handle of a gun in plain view, protruding from underneath the seat (A. 21, 25, 26). He promptly seized the loaded pistol and placed respondent under arrest (A. 12-13, 15, 20, 21-22, 26).

Prior to trial, respondent moved to suppress the weapon on the ground that "the search of the car was unreasonable and violative of defendant's Constitutional rights" (A. 7-8). The court denied the motion after an evidentiary hearing (A. 42). In denying the motion, the hearing court recognized the "obvious" governmental interest in inspecting a VIN plate, the very purpose of which ". . . is to provide a ready means by which to determine if a vehicle is stolen" (A. 46). Since a VIN inspection could not infringe respondent's right to privacy, the hearing court concluded that "[t]he check of the VIN after a legal stop for [a] traffic violation was certainly reasonable under the specific circumstances, notwithstanding any lack of probable cause to believe the car had been stolen" (A. 46). Following the denial of his motion to suppress, respondent pleaded guilty to the crime of Criminal Possession of a Weapon in the Third Degree [N.Y. Penal Law § 265.02(4) (McKinney 1984)], but preserved the right to raise the denial of his suppression motion as an issue on appeal.* Respondent was sentenced to a probationary term not to exceed five years.

* The right to appeal the suppression order was preserved pursuant to New York Criminal Procedure Law section 710.70(2) (McKinney 1984), which provides for review of these orders notwithstanding the subsequent entry of a guilty plea.

The Decision of the New York Supreme Court, Appellate Division, First Department

Respondent's judgment of conviction was affirmed without opinion by a four-justice majority of a panel of the New York Supreme Court, Appellate Division, First Department (A. 49). In a separate dissent, Justice John Carro asserted that because respondent's conduct was not suspicious, there was no predicate for believing his car was stolen and, thus, the "search" for the VIN was unreasonable under the Fourth Amendment (A. 49-51).

The Decision of the New York Court of Appeals

In a 5 to 2 decision, the New York Court of Appeals reversed the order of the Appellate Division and ordered the suppression of the weapon and the dismissal of the indictment (A. 53-54). In its opinion, the majority held that, by opening respondent's car door, and by reaching within to move the paper covering the dashboard VIN, the officer exposed "hidden areas" of the vehicle and, thus, conducted a "search" within the meaning of the Fourth Amendment (A. 57). The majority concluded that the commission of an ordinary traffic infraction could not justify such an intrusive "search" (A. 59). The court considered respondent's status as an unlicensed driver to be irrelevant to its analysis, because Officer McNamee was unaware of this fact when he attempted to inspect the VIN (A. 58).

The dissent, however, argued that there could be no "expectation of privacy" in a VIN which existed solely to "proclaim the identity of the vehicle" and, thus, that its inspection was justified following the lawful stop for a traffic infraction (A. 61-62).

Summary of Argument

This is a case in which respondent, an unlicensed driver operating a motor vehicle on the streets of The Bronx, was ordered to pull over by police officers who were on motor patrol because they saw respondent commit two traffic violations. It is undisputed that this initial seizure of respondent and the automobile he was driving was lawful. This case, therefore, presents the important and recurring question of whether, in connection with a lawful traffic stop, police officers may make a minimally intrusive entry into the interior of the vehicle for the limited purpose of routinely inspecting the automobile's vehicle identification number (VIN). Here, the VIN was located on the top of the vehicle's dashboard, and would ordinarily have been viewable from outside the vehicle but for the fact that respondent had allowed a scrap of paper to settle on top of the VIN, thereby obscuring it. As respondent had, of his own volition, already vacated the vehicle, one of the police officers attempted to effect a VIN inspection by merely reaching into the vehicle, through the door which he had opened, in order to remove the piece of paper covering the VIN. In doing so, the officer noticed on the floor of the vehicle a loaded pistol, sticking out from under the driver's seat, which was then seized by the officer.

A. The New York Court of Appeals' reversal of repondent's conviction and the suppression of the pistol were predicated upon an erroneous holding that the police officer violated respondent's Fourth Amendment rights because in opening the door and then reaching within to expose the VIN for a routine inspection, he had conducted an illegal "search" of the automobile. The New York Court of Appeals concluded that in the context of a routine traffic stop, the Fourth Amendment requires that before a "search" of the vehicle related to a VIN may occur, there must exist a

basis to believe, whether it be "probable cause or some lesser justification," that a more serious crime, independent of the observed traffic infractions, has taken place (A. 58).

The New York Court of Appeals erred in determining that a "search," as that term applies to the Fourth Amendment, occurred here because the police officer did not invade any "reasonable expectation of privacy" that respondent might have justifiably possessed. This Court has long recognized that in contrast to the home, there is a reduced expectation of privacy with respect to one's automobile, and that lesser expectation of privacy is due in large part to "the pervasive regulation of vehicles traveling the public highways .... The public is fully aware that it is accorded less privacy in its automobile because of the compelling governmental need for regulation." *California* v. *Carney*, —— U.S. ——, 53 U.S.L.W. 4521, 4523 (1985). Central to that regulatory scheme is the VIN, which is the only certain device by which to achieve the positive identification of a particular vehicle.

The VIN serves not only as the most effective tool in the battle against our national car-theft epidemic, but also as the primary means by which compliance with vehicle registration, safety inspection, and liability insurance regulations may be assured. Required now by federal regulation to be located in a position ordinarily easily viewable from outside the vehicle, there can be no question that the VIN plate is intended to be accessible for routine inspection in order to satisfy legitimate governmental and societal interests. Indeed, it is generally unlawful for an owner of a vehicle to remove the VIN plate, or alter it in any way. Quite simply, the VIN plate has been placed on the car for the primary purpose of permitting the police and other governmental agents to inspect it and, therefore, the individual may not possess a reasonable expectation of privacy with respect to the VIN plate itself, or the information it possesses. Although we are mindful that police officers may

not arbitrarily stop vehicles proceeding along the highway for the sole purpose of conducting a VIN inspection (*Delaware* v. *Prouse*, 440 U.S. 648, 659 [1979]), once police officers have lawfully seized a vehicle and its driver because of a traffic infraction, surely the routine VIN inspection may be carried out in conjunction with the license and document inspection which lawfully attends the traffic stop.

The New York Court of Appeals' incorrect conclusion that a "search" took place here because the police officer's act of opening the door and reaching within the passenger compartment exposed "hidden areas" of the vehicle fails to consider that there are many situations, including the one present here, that may arise during the course of a routine traffic stop in which limited police entry into the seized vehicle may be necessary, but which cannot be logically categorized as "searches." For example, when a stopped motorist emerges from his vehicle and walks to the police car, an investigating officer must have the right to enter the stopped vehicle and turn off the ignition if the motor has been left running; if the car poses a potential hazard to other traffic, the officer must be allowed to reach in and turn on the automobile's warning flashers; if stopped on an incline, the police officer must be allowed to enter the vehicle to set the emergency brake. Perhaps most importantly, if, as here, the police are confronted with an unlicensed driver, it is critical that he not be allowed to operate the vehicle any further, and police entry to park the car, secure it, or prepare it for towing and impoundment must be countenanced.

Although it is true, as the New York Court of Appeals noted, that the police officer here was in pursuit of "information" when he entered the vehicle, the quest for information with respect to which there can be no reasonable expectation of privacy—the VIN—could not convert this particular entry into a "search" within the meaning of the Fourth Amendment. The incidental exposure of some "hidden areas" near the floor of the vehicle was merely a minor matter ancillary to the police officer's quite limited,

minimal entry into the vehicle for the proper purpose of making possible a VIN inspection.

Indeed, this should not be viewed as a "search" because there was no effort at all to locate contraband, evidence of a crime, private property or personal information of any type. There was no rummaging search of the traditional sort, no opening of sealed containers, and the police officer did not even look under the seats. We believe that under these circumstances the Court should find that there was no "search" here, within the meaning of the Constitution, and as a matter of simple common sense.

There is no merit to the New York Court of Appeals' suggestion that the police conduct here would have been lawful if the officers had directed respondent to reenter his vehicle and expose the VIN himself. Had the police followed that advice, they would have been required to send respondent back into an automobile where a loaded pistol lay within his easy reach. A due regard for the safety of the police officer should make unnecessary the pursuit of such a dangerous course of action.

B. 1. If a "search" did take place here, then the considerations which governed this Court's decision in *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977), compel the conclusion that the search was a "reasonable" one because it was nothing more than a *de minimus* incremental intrusion following the lawful stopping and "seizure" of respondent's automobile for the traffic violations. The limited additional intrusion engendered by the VIN inspection related directly to, and was justified by, the traffic violations which inspired it.

2. Moreover, after the stopping of the vehicle, one of the police officers learned that respondent was an unlicensed driver. Too, the vehicle registration which respondent tendered to that officer showed that the car was owned by someone else, ultimately determined to be respondent's brother-in-law, a fact that could not be ascertained at the

scene of the traffic stop. The New York Court of Appeals refused to attribute this additionally obtained information to the other officer, who was contemporaneously conducting the VIN inspection, and this aspect of the court's ruling was also incorrect. The collective knowledge of all of the police officers present at the scene of a traffic incident or street encounter should govern the determination of whether the totality of the state action taken against the individual citizen was "reasonable" under the Fourth Amendment. Beyond question, the totality of the information known by both of these officers provided ample justification for the VIN inspection.

3. But, even if the additionally learned facts are not to be imputed to the officer who sought to inspect the VIN, his actions were reasonably undertaken, being directly related to, and occurring as a reasonable part of, the routine document inspection following this lawful traffic stop. The VIN inspection that he wished to conduct is similar in many ways to the warrantless and unsuspicioned "administrative searches" taken with respect to "pervasively" regulated industries that have been upheld by this Court. As the private and commercial use of the automobile on the public highways is also the subject of "pervasive" regulation, this minimally intrusive entry for the purpose of carrying out the legitimate regulatory interests of society, predicated as it was in this case on the lawful seizure of the vehicle for two traffic violations, must be sustained if the Court is not to render those important regulatory efforts nugatory.

C. Regardless of whatever reasonable expectations of privacy may be possessed by the licensed driver who becomes the subject of a roadside stop for a traffic infraction, certainly those of respondent, an unlicensed driver, were substantially diminished once his illegal operation of the vehicle triggered a lawful police decision to pull him over. As soon as this occurred, respondent had to be charged with the reasonable awareness that the police, upon learning of his status as an unlicensed driver, would have the duty and obligation to assume full dominion and control of the vehicle.

It was necessary that respondent's ability to operate the vehicle be immediately terminated, and this had to justify some degree of police intrusion into the interior of the vehicle. Respondent's wrongful presence behind the steering wheel of that automobile moving through the streets of The Bronx denied him the right to object to the limited police entry of the type that occurred here during the course of the lawful traffic stop. Indeed, respondent's unlicensed operation of the vehicle allowed its impoundment and towing, which could have been attended by a complete inventory search of its interior. Hence, the limited, minimal entry which actually took place was not as severe an intrusion as was permitted under these circumstances.

D. Finally, since the weapon was recovered from respondent's vehicle following its stop for a traffic violation which, without more, could have resulted in respondent's full custodial arrest, the instant case presents the question left open in *Michigan* v. *Long*, 463 U.S. 1032, 77 L.Ed.2d 1201, 1211 (1983): whether in the context of a routine stop for a traffic violation, "if probable cause to arrest exists, but the officers do not actually effect the arrest, . . . the police may nevertheless conduct a search as broad as those authorized by Belton and Ross." Had the police first arrested respondent they clearly could have searched his vehicle incident to that arrest in order to preserve their safety. Their decision not to arrest respondent initially should not have worked to their detriment by preventing the officers from undertaking the same protective action, insofar as the risks inherent in a routine traffic stop are even greater when the traffic offender is neither handcuffed nor arrested. In order to further a policy of not arresting traffic offenders summarily when the apparent circumstances might seem initially to warrant only the issuance of a traffic ticket, officers such as those in the instant case, who respect the liberty interests of motorists and choose not to effect their full arrests prior to performing document and VIN inspections, must not be placed in any greater jeopardy, and should, therefore, be permitted limited protective searches of the stopped vehicles' passenger compartments.

ARGUMENT

The actions of a police officer taken to effect a routine inspection of the Vehicle Identification Number of an automobile driven by respondent, an unlicensed operator, following the lawful stopping of the vehicle for two traffic violations, did not violate respondent's Fourth Amendment rights.

In *Delaware* v. *Prouse*, 440 U.S. 648, 659 (1979), the Court observed that "[v]ehicle stops for traffic violations occur countless times each day; and on these occasions licenses and registration papers are subject to inspection and drivers without them will be ascertained." The present case emanates from one of those "countless" routine, lawful traffic stops. On May 11, 1981, respondent was driving a 1972 Dodge Charger with a broken windshield at an excessive rate of speed through the streets of The Bronx when he was pulled over by New York City Police Officers McNamee and Meyer, who were on patrol duty in an unmarked radio car. There is no dispute, for there can be none, that this initial police "seizure" of respondent was in compliance with the Fourth Amendment, as both speeding and driving an automobile having a broken windshield are violations of New York's Vehicle and Traffic Law. N.Y. Veh. & Traf. Law §§ 375(22), 1180(d) (McKinney 1984) During the routine police inquiry immediately following the stop, for which respondent had left his vehicle and approached the police car, respondent displayed to Officer Meyer, with whom he spoke, a registration certificate and insurance card which indicated that the automobile belonged to someone else (respondent's brother-in-law [A. 32]). Additionally, respondent's status as an unlicensed driver was revealed, establishing that he had no right to operate a motor vehicle anywhere in New York. N.Y. Veh. & Traf. Law § 509 (McKinney 1984).

While respondent spoke with Officer Meyer, his partner, Officer McNamee, had walked over to the vehicle respondent had been driving to perform the routine task of looking at

the automobile's vehicle identification number (VIN).* Officer McNamee believed the VIN plate would be affixed to the driver's door-jamb because this was an "older car," and he thus opened the driver-side door to conduct his inspection of the VIN. When he saw no VIN located there, Officer McNamee stepped over to the car's windshield, and, from outside the car, tried to look through the windshield

* The Vehicle Identification Number (VIN) is a serial number which, pursuant to mandatory federal and state regulatory schemes, must be affixed by the manufacturer to any motor vehicle that will operate in the United States. The source of current federal regulation is the Federal Motor Vehicle Safety Standard No. 115, which became effective January 1, 1969, and which is now contained in 49 C.F.R. § 571.115. *See* N.Y. Veh. & Traf. Law § 431 (McKinney 1984). In vehicles manufactured before 1981, the VIN consists of 13 coded numerals and letters; starting with automobiles manufactured in 1981, the VIN consists of 17 numerals and letters.

The purpose of the VIN is to serve as a reliable and positive means by which to identify a particular motor vehicle. In coded form, the VIN will contain considerable information about the vehicle it is to be affixed to, including the manufacturer, make, model, body type, engine type, country of manufacture, the plant of manufacture, and the year of production. The final six digits of the VIN reflect the production sequence number of the specific vehicle. In all passenger vehicles produced during 1969 or later, the metal VIN plate must appear in open view on the left side of the top of the dashboard, and must be viewable through the windshield:

> The VIN for passenger cars . . . shall be located inside the passenger compartment. It shall be readable, without moving any part of the vehicle, through the vehicle glazing under daylight lighting by an observer having 20/20 vision (Snellen) whose eye point is located outside the vehicle adjacent to the left windshield pillar. Each character in the VIN subject to this paragraph shall have a minimum height of 4 mm.

49 CFR § 571.115(S 4.6).

This is generally referred to as the "public" VIN, or PVIN. In older models the "public" VIN plate was usually affixed to the door jamb for the driver's-side front door. Additionally, in most pre- and post-1969 vehicles, the "public" VIN can be located, additionally, under the hood, on the engine, where it is engraved.

Beyond the "public" VIN, all vehicles carry a matching "confidential" VIN (CVIN), which is hidden in some obscure portion of the vehicle, the position of which is usually known only by the manufacturer and law enforcement authorities. It is this confidential VIN which is used to deal with the problem of illegally transferred or altered VIN plates. By comparing the "public" VIN with the "confidential" VIN, an inspector will know whether a particular VIN plate belongs to the car to which it is currently affixed.

at the VIN plate that he now knew would be found on the dashboard, in a location that should have allowed for easy viewing from without. However, Officer McNamee found that the VIN plate was hidden by a piece of loose paper. Accordingly, he merely reached through the open door of the autmobile into the passenger compartment for the sole purpose of moving aside the offending scrap of paper and, in doing so, happened to look down at the vehicle's floor, where he noticed the butt of a loaded revolver protruding from underneath the driver's seat. This weapon, found in plain view, then served as the basis for respondent's felonious weapon's possession conviction.

The New York Court of Appeals, however, reversed this conviction, ruling that Officer McNamee had violated respondent's Fourth Amendment rights by opening the automobile's door and then reaching within to expose the paper-covered VIN plate, because the officer conducted an illegal "search" of the vehicle's interior absent probable cause or reasonable suspicion to believe that the car was stolen, or that any other serious criminal wrongdoing was afoot. This unsound ruling should not be allowed to stand, for, without furthering or protecting any meaningful privacy interest guarded by the Fourth Amendment, the New York Court of Appeals has adversely and substantially interfered with legitimate law enforcement and societal concerns by its severe curtailment of the scope of the generally innocuous, but certainly important, police activity which may attend the routine roadside stop for a traffic violation.

The lawfulness of the police action taken here may be founded upon a number of different, although not necessarily mutually exclusive, bases. First, the New York Court of Appeals' entirely flawed constitutional analysis was skewed from the outset, we believe, by the erroneous assumption that what occurred here was a "search" within the meaning of the Fourth Amendment. No "search" took place because respondent lacked any justifiable or reasonable expectations of privacy with respect

to the information contained on the VIN plate itself, the common areas of the automobile which were exposed to the police officer's view by the opening of the car door, or that space within the passenger compartment through which Officer McNamee's hand passed as he reached inside, over the top of the dashboard, to remove the piece of paper covering the VIN. But, even if it can be said that a "search" was conducted, then certainly it was one that was reasonable and, therefore, permissible under the Fourth Amendment, in light of the very limited and minimal nature of the additional, incremental intrusion following this lawful traffic stop, as balanced against the considerable importance of obtaining the information sought.

Then, there is respondent's status as an unlicensed operator. Although the New York Court of Appeals judged this factor to be of no moment, we believe it to be a matter of considerable significance. For, surely, once an unlicensed driver is discovered pursuant to a lawful traffic stop, he cannot harbor any legitimate expectation of privacy that could serve to bar a police officer's entry into the interior of the automobile that had been unlawfully operated. To the contrary, the unlicensed operator must be seen as retaining, at best, a diminished expectation of privacy with respect to the interior of his automobile. In the situation of an unlicensed driver, it is critical that the police take steps to assure that no further unlicensed operation of the automobile occurs. This will often necessarily entail police entry into the passenger compartment for the purpose of moving the vehicle off the roadway, securing the vehicle before removing the unlicensed driver from the scene, or performing those tasks related to the impoundment or towing of the vehicle, perhaps including an inventory search of the entire automobile. Thus, because respondent was an unlicensed operator, the opening of his car door and entry into the vehicle by a police officer should not have been subject to challenge.

Finally, we believe that the Court may, on the uncontested facts before it, now decide the important question

expressly left open by its decision in *Michigan* v. *Long*, 463 U.S. 1032, 77 L.Ed.2d 1201, 1211, n.1 (1983): whether, in the context of a routine stop for a traffic violation, "if probable cause to arrest exists, but the officers do not actually effect the arrest, . . . the police may nevertheless conduct a search as broad as those authorized by [*New York* v.] *Belton* [453 U.S. 454 (1981)] and [*United States* v.] *Ross* [456 U.S. 798 (1982)]?" Common sense, as well as the "legitimate and weighty" concern for the safety of police officers engaged in roadside traffic stops (*Pennsylvania* v. *Mimms*, 434 U.S. 106, 110 [1977]), compel the conclusion that the question should be answered in the affirmative. A police officer who has the lawful predicate—and therefore the absolute right—to effect a full, summary arrest for a traffic violation should not be denied the full measure of safety he would have been afforded had he immediately consummated the arrest, simply because he decides instead to exercise restraint and conduct a preliminary investigation with an eye toward issuing a traffic ticket to the driver and allowing him to proceed on his way, unless something develops during the course of the brief roadside investigation which demands the more intrusive, full-blown arrest. Indeed, it must be recognized that during this investigative period it is the detained but unarrested, unhandcuffed driver who poses the greatest potential threat to the police officer's safety. Accordingly, this Court should rule that Officer McNamee would have been justified in searching for and seizing respondent's loaded pistol from the easily reachable area underneath respondent's seat, and that the police officer's actual discovery of the weapon by means of a much less intrusive course of conduct was, therefore, unobjectionable.

A. In the context of a lawful, routine stop for a traffic infraction, the police officer's act of opening the driver-side door of the automobile, and his reaching within to move a scrap of paper blocking his inspection of the VIN, otherwise viewable through the windshield, was not a "search" within the meaning of the Fourth Amendment.

The question of whether a routine VIN inspection constitutes a "search" under the Fourth Amendment has been the subject of extensive litigation. The New York Court of Appeals' untenable ruling that Officer McNamee violated the Fourth Amendment by conducting an illegal "search" of the automobile when he engaged in his minimally intrusive attempt to perform a routine visual inspection of the VIN, following the lawful stop of the vehicle for a traffic infraction, reflects a minority view which conflicts with the weight of lower court authority considering the issue of VIN inspections. Most of the federal courts of appeal and state appellate courts addressing the issue have reached the contrary conclusion that VIN inspections, even those involving an opening of the door or the lifting of the hood, are not "searches" within the meaning of the Fourth Amendment. *See, e.g. United States* v. *Forrest,* 620 F.2d 446, 454-455 (5th Cir. 1980) (opening of door to inspect VIN not a search); *United States* v. *Duckett,* 583 F.2d 1309, 1312-13 (5th Cir. 1978) (opening of door and police officer's leaning inside to inspect VIN not a search); *United States* v. *Wood,* 500 F.2d 681, 682-683 (5th Cir. 1974) (removal of grease and dirt obscuring VIN on truck not a search); *United States* v. *Polk,* 433 F.2d 644, 646-647 (5th Cir. 1970) (opening of door and lifting of hood to inspect VIN not a search); *United States* v. *Johnson,* 431 F.2d 441 (5th Cir. 1970) (en banc) (opening of door and inspection of frame for public and confidential VINs not a search); *United States* v. *Graham,* 391 F.2d 439, 443 (6th Cir.), *cert. denied,* 393 U.S. 941 (1968) (opening of car door to inspect VIN not a search); *United States* v. *Ware,* 457 F.2d 828, 829 (7th Cir.), *cert. denied,* 409 U.S. 888 (1972) (opening of car door

and examination of frame to inspect public and confidential VINs not a search); *Cotton* v. *United States*, 371 F.2d 385, 393 (9th Cir. 1967) (opening of door to inspect VIN not a search); *United States* v. *Kitowski*, 729 F.2d 1418, 1421 (11th Cir. 1984) (opening of door to inspect VIN not a search); *State* v. *Sedacca*, 252 Md. 207, 249 A.2d 456, 457 (Md. App. 1969) (opening of door to inspect VIN not a search); *People* v. *Brewer*, 112 Mich. App. 670, 317 N.W.2d 218, 219 (Mich. App. 1981) (opening of door to inspect VIN not a search); *People* v. *Valoppi*, 61 Mich. App. 470, 233 N.W.2d 41, 45-46 (Mich. App. 1975) (inspection of confidential VIN not a search); *Wood* v. *State*, 632 S.W.2d 734, 741 (Texas Cr. App. 1982) (police entry into car and opening of hood to inspect VIN not a search); *see, also, United States* v. *Zemke*, 457 F.2d 110 (7th Cir.), *cert. denied*, 406 U.S. 947 (1972) (inspection of confidential VIN under motorcycle crankcase not a search); *People* v. *Brooks*, 405 Mich. 225, 274 N.W.2d 430, 434-435 (Mich. 1979) (inspection of confidential VIN on engine and frame, conducted by crawling under vehicle, not a search); *Shirley* v. *Commonwealth*, 218 Va. 49, 235 S.E.2d 432, 433-436 (Va. 1977) (implying inspection of VIN not a search); *State* v. *Cohn*, 284 So.2d 426, 427 (Fla. App. 1973) (alternatively holding that opening of locked car door with wire hanger to inspect VIN was not a search); *but cf. United States* v. *Powers*, 439 F.2d 373, 374-376 (4th Cir. 1971), *cert. denied*, 402 U.S. 1011 (VIN inspection a search made lawful by "a legitimate reason to identify a motor vehicle"); *Simpson* v. *United States*, 346 F.2d 291 (10th Cir. 1965) (entry into vehicle to check VIN was an unlawful search without warrant); *State* v. *Moore*, 66 Ha. 202, 659 P.2d 70 (Ha. 1983) (opening of hood for confidential VIN inspection constituted illegal search under Fourth Amendment and Hawaii Constitution); *State* v. *Sidebotham*, 124 N.H. 682, 474 A.2d 1377 (N.H. 1984) (entry into car to examine confidential VIN on steering column was illegal search which violated New Hampshire Constitution—*accord: State* v. *McGann*, 124 N.H. 101, 467 A.2d 571, 573 [1983]); *State* v. *Simpson*, 95 Wash.2d 170, 622 P.2d 1199, 1208-10 (Wash. 1980) (inspection of hidden VIN on door of parked, locked truck was an illegal search);

People v. *Piper*, 101 Ill. App. 3d 296, 427 N.E.2d 1361, 1363-65 (Ill. App. 1981) (opening of door to inspect VIN was illegal search).

But more importantly, the New York Court of Appeals' declaration that a "search" took place here is squarely at odds with the long-accepted analytical approach utilized by this Court in determining what type of police action qualifies as a "search" within the meaning of the Fourth Amendment. The Court has frequently reiterated that such "[a] 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States* v. *Karo*, 468 U.S. ——, 82 L.Ed.2d 530, 539 (1984), quoting from *United States* v. *Jacobsen*, 466 U.S. ——, 80 L.Ed.2d 85, 94 (1984); *Oliver* v. *United States*, 466 U.S. ——, 80 L.Ed.2d 214, 223 (1984); *Illinois* v. *Andreas*, 463 U.S. 765, 77 L.Ed.2d 1003, 1010 (1983); *United States* v. *Knotts*, 460 U.S. 276, 75 L.Ed.2d 55, 61-62 (1983); *Smith* v. *Maryland*, 442 U.S. 735, 739-741 (1979); *see Rakas* v. *Illinois*, 439 U.S. 128, 143-144, n.12 (1978). A subjective expectation of privacy, although relevant, will not alone suffice; the privacy expectation must be "justifiable" or "legitimate," meaning, of course, that the individual's subjective expectation of privacy is "one that society is prepared to accept as 'reasonable'." *Smith* v. *Maryland*, 442 U.S. at 740, *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *see Oliver* v. *United States*, *supra* (marijuana cultivators could not create "legitimate" expectation of privacy in their "open fields" by building fences and posting "no trespassing" signs).

Because of the very special nature and purpose of the VIN, under no circumstances could respondent harbor a legitimate expectation of privacy related to the VIN plate affixed to the dashboard, or the information it contained. Indeed, since that VIN would ordinarily be subject to a "plain view" inspection by any and all from outside the vehicle, had respondent not intentionally or negligently allowed the VIN to become obscured by that mischievous

scrap of paper, this "search" case would not be before the Court today. *See Texas* v. *Brown*, 460 U.S. 730, 75 L.Ed.2d 502, 512-513 (1983); *see Walter* v. *United States*, 447 U.S. 649, 663-664 (1980) (Blackmun, J., dissenting). For no court has questioned the right of the police to inspect a VIN and take note of the information contained thereon when accomplished by the simple act of peering through the vehicle's windshield. *See, e.g., United States* v. *Brown*, 535 F.2d 424, 428 (8th Cir. 1976); *United States* v. *Wagner*, 497 F.2d 249, 252 (10th Cir. 1974); *Shaw* v. *State*, 253 Ga. 382, 320 S.E.2d 371 (Ga. 1984) *cert. denied*, —— U.S. ——, 84 L.Ed.2d 331 (1985); *State* v. *Simpson*, 622 P.2d at 1209, *supra*. Nor could respondent fabricate a "legitimate" expectation of privacy concerning this VIN plate by permitting it to become hidden under a piece of paper. *See Oliver* v. *United States*, *supra*. Indeed, even if this particular VIN plate had been located on the driver-side door jamb as Officer McNamee originally assumed, thereby requiring an opening of the door to allow an inspection, no greater legitimate expectation of privacy would have been extant, since even that placement of the VIN would be designed to accomplish easy accessibility and viewability.*

As this Court recently made clear in *California* v. *Carney*, —— U.S. ——, 53 U.S.L.W. 4521, 4523 (1985), the

* Petitioner does not address the question of whether the opening of a hood from the outside of the vehicle would constitute a search. The New York Court of Appeals did not expressly decide this issue, limiting its decision to the question of whether the opening of a car door and the non-consensual entry into the passenger compartment of respondent's vehicle was a search. It is hard to imagine, however, that a person might have a legitimate and reasonable expectation of privacy with respect to a VIN mounted on the engine block. Certainly, personal possessions or other valuables are unlikely to be either stored or secreted under a hood. The only person likely to deal with the motor area is a mechanic or garageman. Nevertheless, at least one court has declared an inspection of a VIN located on the motor, under the hood, to be an illegal search. *See State* v. *Moore*, 66 Ha. 202, 659 P.2d 70 (Ha. 1983).

Presumably the New York Court of Appeals' decision would prohibit a sub-hood VIN inspection where the police officer would first have to enter the passenger compartment to undo a hood latch from within, as is common with newer cars. Any such action taken by the police officer would be governed by the analysis of the instant case.

long-recognized reduced expectation of privacy which serves to distinguish automobiles from homes in Fourth Amendment analysis (*see, e.g., South Dakota* v. *Opperman*, 428 U.S. 364, 367-368 [1976]; *Cardwell* v. *Lewis*, 417 U.S. 583, 590 [1974]), emerges not so much from the relatively non-private configuration of the vehicle (*see Cardwell* v. *Lewis, supra*), but "from the pervasive regulation of vehicles capable of traveling on the public highways . . . . The public is fully aware that it is accorded less privacy in its automobile because of this compelling governmental need for regulation." 53 U.S.L.W. at 4523. At the core of this regulatory process is the VIN. Because there are so many automobiles of the same make and color, and in view of the easy availability of paint jobs and the quick transferability of license plates,* the VIN exists as the only effective means for achieving the positive identification of a particular automobile.

The VIN may be analogized to a person's fingerprints. Its sole purpose is to proclaim the true "identity" of a particular vehicle. The same VIN may not be issued to two automobiles manufactured within the same 30-year period (49 CFR § 571.115 [S4.4]), a lengthier span of time than the normal life of almost every car on the road today. Although the "public" VIN, most often found on the dashboard but sometimes on the door frame, may be removed with considerable difficulty, or subjected to alteration, the "confidential" VIN, the location of which is generally known only to the manufacturer and law enforcement authorities, will be indelibly etched somewhere on a major component of the vehicle, like the chassis, the steering column, or the engine block.

It is because of this guarantee of positive identification that the VIN is used as the primary means for vehicle iden-

* *See United States* v. *Williams*, 434 F.2d 681, 683 (5th Cir. 1970) *cert. denied*, 401 U.S. 1011 (1971); *Shirley* v. *Commonwealth*, 235 S.E.2d at 434, *supra*. According to the 1984 New York Statewide Police Information Network, Year End Report, p. 1305, there were 29,062 cases of stolen license plates.

tification in almost every aspect of that "pervasive" regulatory scheme.* Hence, the automobile's registration certificate, which in New York also contains proof of a proper annual safety inspection, and which must be displayed to the police following a stop for a traffic infraction (N.Y. Veh. & Traf. Law § 401 [McKinney 1984]) prominently sets forth the VIN. It is by comparing the registration certificate to the VIN that a police officer will learn whether a vehicle he has stopped is properly registered. Of course, the VIN also serves as a valuable tool in the war against car theft, a national problem of major proportion, as the VIN will quickly help a police officer determine whether a vehicle is lawfully possessed by a driver. A stolen car's VIN is entered into the nation-wide computerized National Crime Information Center (NCIC) which provides police with information that a car has been stolen anywhere in the country.

Furthermore, a separate card showing proof of adequate liability insurance coverage is required to be carried in a vehicle. It must, in addition to the registration, be displayed to police officers when a driver is stopped for a routine traffic infraction (*see* N.Y. Veh. & Traf. Law § 312[1][b] [McKinney 1984]), or to other drivers when a person is involved in a traffic accident (*see* N.Y. Veh. & Traf. Law § 318 [12][a] [McKinney 1984]). This card, too, relies on the automobile's VIN as the primary basis for positively establishing that a particular vehicle is properly insured.

Additionally, the VIN plays a major role in aspects of this pervasive regulatory scheme which are somewhat more removed from the context of the highway traffic stop. One of the important purposes behind the federal regulatory

* The numbers of license plates, affixed to the exterior of the vehicle and with respect to which there is no reasonable expectation of privacy (*see United States* v. *Hensel*, 699 F.2d 18, 31-32 [1st Cir.], *cert. denied*, 461 U.S. 958, [1983]), are used for the regulatory scheme as well, appearing on registration certificates and insurance cards. But, as noted, they may be stolen or transferred easily with the quick twist of a screwdriver.

requirement that an automobile's VIN be easily viewable through the windshield, in addition to the general law enforcement need "to simplify vehicle information retrieval," is "to reduce the incidence of accidents by increasing the accuracy and efficiency of vehicle recall campaigns." 49 C.F.R. § 571.115 (S1). The VIN is also essential to the routine transfer of title, and matters such as the recording of a security interest in a vehicle after a bank has loaned money to some person making the purchase of a car possible.

From all of this it is evident that the individual driver can have no legitimate expectation of privacy in the VIN plate that has been affixed to his car. It has been placed there by the automobile manufacturer, under federal regulatory mandate, not because the buyer of the car would desire to have it as part of his purchase, but because compelling societal and governmental interests demand that automobiles carry some permanent, easily verifiable, and unique form of positive identification in order to assure compliance with the multitude of regulatory policies that are in effect, and to both deter and detect automobile theft. Simply stated, the VIN plate is affixed to the dashboard so that the police officer, and anyone else, can look at it. Alteration or removal of the VIN, even by the owner of the car, normally constitutes a crime. *See* N.Y. Penal Law § 170.65 (McKinney 1984).

Even the New York Court of Appeals seemed to accept the validity of the unremarkable proposition that there is no "legitimate expectation of privacy in the VIN itself . . . ." (A. 58). The court, however, expressed its concern that "the existence of a VIN on every automobile cannot enable police, without any basis, to make 'wholesale entries of cars on nothing more than a hope that one of them might turn out to be stolen' (1 W. LaFave, Search and Seizure, § 2.5, p. 360)" (A. 58). In making this statement, the Court of Appeals showed that it had missed the point of petitioner's arguments.

Petitioner does not dispute that, despite the importance of the regulatory scheme, vehicles proceeding along the highways cannot be arbitrarily stopped solely for the purpose of allowing the police to inspect the VIN. But this is no novel proposition, as the Court has already expressed this opinion quite clearly in *Delaware* v. *Prouse*, 440 U.S. 648. Petitioner does contend, however, that once a vehicle has been lawfully prevented from proceeding on its way because of some unlawful operation of the vehicle, that predicate alone may properly trigger a document examination (*see Delaware* v. *Prouse*, 440 U.S. at 659) and the policeman's routine inspection of a VIN plate to assure compliance with the pervasive regulatory scheme, even if, as here, it necessitates the opening of an automobile's door to do so. Thus, it is not arbitrary or unfettered police discretion which sets the VIN inspection in motion, but rather the actions of the motorist in breaking the rules of the road. A police officer must have the right to identify positively not only the driver who has committed the traffic infraction, but the vehicle involved. Otherwise, it would render all of the legitimate regulatory interests nugatory. The driver's display of the automobile's registration certificate alone will not suffice, because although possession of that document will usually constitute a *prima facie* indication that the automobile is lawfully possessed by the driver, without comparing the registration against the VIN plate there is no way of knowing for sure that the registration certificate is for that particular car.* Furthermore, the important question of adequate liability insurance coverage cannot be definitively resolved without a comparison between the in-

* In a nation where car theft is an epidemic (in New York alone, there were more than 650,000 stolen cars reported between 1979 and 1983—Source: State of New York, Division of Criminal Justice Services, Uniform Crime Reporting Statistics, 1979-1983, p. 15), surely the best interests of society are served by the swift detection of whether a car stopped during a traffic stop has been stolen. Indeed, the car thief possessing a stolen car lacks any "reasonable expectation of privacy" which might serve as a grounds for challenging a police search of the automobile, or a VIN inspection. *See Rakas* v. *Illinois*, 439 U.S. 128, 141 n.9 (1978).

formation contained on the insurance card and the automobile's VIN.*

Against these weighty governmental and societal interests served by the VIN, the individual sacrifices few, if any, justifiable personal privacy interests by the inspection of the VIN, even an inspection that is accomplished by the opening of the car door. The New York Court of Appeals erroneously concluded that a "search" occurred because Officer McNamee's opening of the door and his reaching within to move the paper on the dashboard exposed "hidden areas" of the automobile (A. 57). Preliminarily, the New York Court of Appeals' use of the term "hidden areas" is somewhat misleading. Although Officer McNamee first noticed the butt of respondent's pistol when the officer reached into the car through the open door, his testimony is unequivocal in establishing that the handle was sticking out "from the driver's seat underneath" (A. 21), by "approximately an inch" (A. 26). In actuality, therefore, the gun butt may well have been viewable from outside the automobile by an officer or anyone else looking through the side windows toward a point on the floor of the vehicle near where the driver's feet would be located. Certainly, at no time did Officer McNamee look under the driver's seat into one of the very truly "hidden areas" of the relatively exposed automobile interior. *See Cardwell* v. *Lewis*, 417 U.S. at 590, *supra*.

Furthermore, the New York Court of Appeals failed to consider that there may be many different situations during the course of a routine stop for a traffic infraction when police officers might be legitimately, indeed necessarily, called upon to open the automobile's door and physically enter the vehicle. For example, if the driver chooses to leave his vehicle upon being pulled over and then approaches the police car, an officer who walks back to look

* Surely, the societal importance of enforcing a program of sufficient liability insurance coverage cannot be overstated, in view of the tens of thousands of highway fatalities and highway injuries suffered annually by the citizens of this country.

at the vehicle must be free to enter it and turn off the ignition if the car has been left running. *See, e.g., Jackson* v. *Superior Court,* 142 Cal. Rptr. 299, 74 Cal. App. 3d 361 (Cal. App. 1977). Or, if the vehicle constitutes a potential hazard to other vehicular traffic, the officer surely must be allowed to enter the vehicle for the purpose of turning on the emergency rear and front warning flashers. If the car has been stopped on an incline, the officer may understandably find it appropriate to assure that the parking or emergency brake is engaged, or that the wheels are turned into the curb. In the case of an unlicensed driver, as respondent was here, or an intoxicated driver, the police may find it absolutely necessary to enter the vehicle to drive it from the public thoroughfare where it might constitute a hazard or at least ready it for towing. Manifestly, none of these innocuous acts can be considered a "search" within the meaning of the Fourth Amendment, even though they may entail the opening of the door and some degree of police entry into the automobile's interior, thereby exposing the same areas of the passenger compartment that were exposed to easier viewing by Officer McNamee's minimally intrusive conduct here. *See Harris* v. *United States,* 390 U.S. 234, 236 (1968) (the discovery of a registration certificate belonging to the victim of robbery, due to the opening of a car door by a police officer, "was not the result of a search of the car, but a measure taken to protect the car while it was in police custody").

As support for its erroneous conclusion that this was a search, the New York Court of Appeals pointed to the fact that when Officer McNamee initially opened the car door, and subsequently reached within to expose the dashboard VIN, he was seeking "information." But, as we have shown, there existed absolutely no legitimate expectation of privacy with respect to the information he wished to obtain —the automobile's VIN—and, therefore, this quest for "information" could not have created a "search" where none would have otherwise existed.

Indeed, this case presents the Court with an opportunity to make clear that, apart from the consideration of privacy

interests, a VIN inspection does not constitute a "search" of an automobile because this inquiry does not ordinarily involve an attempt to find and seize physical evidence of a crime or contraband, the usual targets of an investigative "seach." *Cf. Cady* v. *Dombrowski*, 413 U.S. at 442, n. Nor was there any rummaging through truly hidden areas of the vehicle such as the space beneath the front seats, the glove compartment, or the trunk, where private or personal items might have conceivably been secreted. The only "information" sought here was that which the officer had a right to know, and his limited entry into the vehicle to expose an area of the automobile for which there could never be a legitimate expectation of privacy—the top of the dashboard —should not be categorized as a search even if it engendered a slightly greater, incidental exposure of a common area of the interior close to where a person's foot would ordinarily rest.

To be sure, the illogical nature of the result reached by the New York Court of Appeals is underscored by its suggestion that no search, and no intrusion on respondent's privacy interests, would have occurred if the police officers had required respondent to return to his car to open the door of his vehicle and personally remove the piece of paper hiding the VIN (A. 60). Yet the same area of floor space would have been exposed to police view by this action and, considering the well-known potential safety threat to police officers attending any traffic stop (*see Pennsylvania* v. *Mimms*, 434 U.S. 106 [1977]), it must be assumed that the officers' eyes would have been keenly trained on every "reachable" area of the vehicle's interior while respondent was performing this act of self-help. Hence, they would have certainly observed the protruding gun butt.

This suggestion by the New York Court of Appeals that a driver must be allowed to return to his car to expose a covered VIN is inconsistent with the Court's ruling in *Pennsylvania* v. *Mimms, supra*. There, it was held that a police officer, in the context of a lawful routine traffic stop,

as a matter of self-protection, may always require the driver to emerge from the vehicle. If this is so, surely the Fourth Amendment does not require that the driver then be allowed to re-enter the vehicle once the police have manifested a desire to conduct a thorough VIN inspection. If such were the case, drivers who are, in fact, armed and dangerous and who have something to hide, would be invited to take some desperate measure against the police. Unjustifiably, the sound rule of *Mimms* would be substantially undercut. Indeed, in this very case, had the police been subject to the rule announced by the New York Court of Appeals, Officers Meyer and McNamee would have been required to send respondent back into a car where a loaded pistol within easy reach lay ready for use.

Accordingly, the Court should hold that the minimally intrusive act of opening a car door and then reaching into the passenger compartment of the automobile for the very limited purpose of making possible the visual inspection of the VIN, during the course of a lawful stop for a routine traffic infraction, impinged on no legitimate or reasonable expectation of privacy and, therefore, was not a "search" as that term relates to the Fourth Amendment.

B. If the mere opening of the automobile's front door and the police officer's limited entry into the interior of the passenger compartment for the sole purpose of exposing the dashboard VIN to visual inspection constituted a "search," it was a patently reasonable "search" satisfying the requirements of the Fourth Amendment.

Even were one to accept the New York Court of Appeals' finding that the police officers' actions amounted to a "search" of the vehicle, its ultimate announcement that the search was violative of the Fourth Amendment because it was unsupported by probable cause or reasonable suspicion to believe that a more serious crime, independent of the observed traffic infractions, was involved, could not be

sustained. If, following the lawful traffic stop, Officer McNamee's minimally intrusive act of opening the car door and then reaching into the passenger compartment for the sole purpose of moving the paper which obstructed the dashboard VIN, was, indeed, a "search" because of the incidental exposure of certain areas near the floor of the vehicle, then under all of the facts and circumstances present the search was surely "reasonable" and, thus, in full compliance with the Fourth Amendment. *See Michigan* v. *Long*, 463 U.S. 1032, 77 L.Ed.2d 1201, 1217-18 (1983) [*quoting Terry* v. *Ohio*, 392 U.S. 1, 21 (1967)]; *compare United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560-561 (1976) (in assessing the reasonableness of the seizure of a vehicle at a fixed checkpoint, the Court stated that "[t]he Fourth Amendment imposes no irreducible requirement of . . . [individualized] suspicion").

1. The New York Court of Appeals' incorrect ruling flows from its erroneous choice to parse out and segregate the various circumstances and stages of this evolving police-citizen encounter, leading it to assume, quite wrongly, that the initial proper stop of the vehicle for two observed traffic infractions was largely irrelevant to the determination of whether the police could then lawfully conduct a limited entry into the vehicle to inspect the VIN. This fundamental defect in the Court's analysis is quite similar to one considered and corrected by this Court in *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977). In *Mimms*, the Pennsylvania Supreme Court found a Fourth Amendment violation in a police officer's directive to a driver lawfully stopped for a traffic infraction to emerge from his vehicle. Once the driver complied, the police officer noticed a "bulge" in the driver's jacket which a pat down revealed to be a pistol. The Pennsylvania Supreme Court determined that, although the original stopping of the vehicle was lawful, the order to emerge was an "impermissible seizure . . . . because the officer could not point to 'objective observable facts to support a suspicion that criminal activity was afoot or that the occupants of the vehicle posed a threat to police safety'." 434 U.S. at 107-108.

This Court reversed, finding the police action taken there, even without any "reason to suspect foul play from the particular driver at the time of the stop," was nevertheless reasonable and, therefore, permissible under the Fourth Amendment. 434 U.S. at 109. In making the determination of reasonableness, the Court noted that the "inquiry must . . . focus . . . on the *incremental intrusion* resulting from the request to get out of the car *once the vehicle was lawfully stopped.*" *Id.* (emphasis added). Balanced against the legitimate, general concern for police safety, the Court had no difficulty in concluding that

> This additional intrusion can only be described as *de minimus.* The driver is being asked to expose very little more of his person than is already exposed. The police have already lawfully decided that the driver shall be briefly detained; the only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it. Not only is the insistence of the police on the latter choice not a 'serious intrusion upon the sanctity of the person,' but it hardly rises to the level of a 'petty indignity'."

434 U.S. at 113.

The analogy to be drawn between *Mimms* and the present case should have been readily apparent to the New York Court of Appeals. True, in *Mimms* the Court was concerned about the limited further "seizure" of a person, and here we are dealing with the additionally incremental "search" of an automobile. But, of course, the respect for the physical integrity of the person must exceed that accorded a vehicle, and even in *Mimms* the Court justified the minimal additional intrusion upon the person of the driver by noting that he was "being asked to expose to view very little more of his person than is already exposed," thus factoring "search" concerns into the analysis. Furthermore, here we are dealing with a "search" which exposed "to view very little more" of the car's interior than was already subject to "non-search" scrutiny from outside the

vehicle. *See Texas* v. *Brown*, 460 U.S. 730, 75 L.Ed.2d 502, 512-513 (1983). Indeed, in actuality the police instruction to emerge from the car in *Mimms*, which required an attendant opening of the vehicle's door, served to expose as much of the interior of the automobile as was revealed by the police action in this case. Unlike *Mimms*, however, here the police did not even have to direct respondent to leave the automobile, as he had already done so of his own volition.

While in *Mimms* the Court was dealing with the important societal concern for police safety and here the governmental and societal interests are primarily related to the overwhelming problem of car theft and the effective enforcement of a "pervasive" automobile regulatory scheme, the fact remains that in both cases the competing privacy interests extending beyond those of the initial stop are of a minimal, inconsequential sort. Indeed, aside from the minor factors differentiating the two cases, in the end, the minimal intrusion caused by the direction to emerge in *Mimms* and the limited entry and search carried out by the police officer here are really flip sides of the same analytical coin. In both instances, the negligible incremental intrusions following the concededly lawful traffic stops gave rise, in the two state appellate courts, to much ado about nothing.

2. Quite apart from *Mimms*, in reviewing the totality of what occurred here, one must conclude that the police conduct was, throughout, perfectly reasonable. The police officers initially interfered with respondent's freedom of movement through the streets of New York City only because he invited that interference by operating the vehicle at an excessive rate of speed, and with an unsafe broken windshield. *See* N.Y. Veh. & Traf. Law §§ 375(22), 1180(d) (McKinney 1984); *cf. Delaware* v. *Prouse*, 440 U.S. at 650. Then, the registration certificate and insurance card which respondent gave to Officer Meyer at the police car indicated that the automobile in question was owned by someone else, later learned to be respondent's brother-in-law (A. 32), a

fact that could not be known for certain at the scene of the stop. Finally, respondent revealed that he was an unlicensed driver.

In rejecting the right of the police to open the door to respondent's car for the purpose of checking the VIN, the New York Court of Appeals refused to impute Officer Meyer's knowledge about the different owner of the vehicle, and respondent's status as an unlicensed operator, to Officer McNamee, who had begun to approach respondent's vehicle before this additional information was disclosed (A. 15, 21). The New York Court of Appeals should have attributed this information known by one member of a police team present at the scene of this roadside encounter to his brother officer, notwithstanding the absence of a communication between the two officers, for a citizen has a right to be free from unreasonable searches conducted by the "State" as a whole (U.S. Amend. 4; Amend. 14), and not individual police officers. Hence, the collective knowledge of all the state agents present at the scene of a police-citizen encounter should be the determining factor with respect to the reasonableness of the official action taken. *United States* v. *Ragsdale*, 470 F.2d 24, 29-30 (5th Cir. 1972); *see also, United States* v. *Stratton*, 453 F.2d 36, 37-38 (8th Cir.), *cert. denied*, 405 U.S. 1069 (1972).

Further support for this proposition is to be found in the Court's recent decision of *United States* v. *Hensley*, —— U.S. ——, 83 L.Ed.2d 604, 612-615 (1985), where it was held that police officers of one jurisdiction could conduct a warrantless *Terry* stop of a suspect based on a flyer request by police officers from another jurisdiction, who possessed reasonable suspicion justifying the stop. While it is true that in *Hensley* there was an officially communicated request between the two police agencies, and here Officer Meyer did not call out the additional information he had learned to Officer McNamee, nor did he ask Officer McNamee to inspect the VIN, such a communication should not be the *sine qua non* for imputing the collective facts to each officer at the scene. Indeed, Officer Meyer, an experienced police

officer who surely had participated in routine traffic stops many times before, and who observed Officer McNamee standing at respondent's car, may well have assumed that a routine inspection of the VIN would ensue without the need for a request.

While the totality of all this information did not necessarily create a reasonable suspicion that the vehicle was stolen, it certainly offered the police a legitimate reason to inspect the VIN.

3. Yet even if the additional pieces of information known to Officer Meyer were not to be credited to Officer McNamee, his decision to inspect the VIN, following the lawful stop for the traffic infractions he personally observed, and the "search" which then occurred, was nonetheless valid. That the "search" lacked probable cause or reasonable suspicion beyond the uncontested probable cause which warranted the initial seizure of the vehicle in the first instance matters not. The "search" of the car to expose the VIN related directly to the law enforcement function and regulatory policies properly being carried out due to respondent's commission of the traffic infractions. Whatever additional minimal privacy intrusion resulted from the "search" was justified and offset by the reduced expectation of privacy that one has in an automobile, and the legitimate governmental and societal need for enforcement of its important regulatory policies. *See California* v. *Carney*, —— U.S. ——, 53 U.S.L.W. 4521, 4523 (1985).

Significantly, the search here was not a rummaging search of private areas and closed containers for contraband or evidence which might require independent probable cause (*see United States* v. *Ross*, 456 U.S. 798 [1982]) or the threshold predicate of a full-blown arrest (*see New York* v. *Belton*, 453 U.S. 454 [1981]; *but see* Argument, Subpoint D, pp. 39-50, *infra*). Nor was this an intrusive *Terry*-type protective "frisk" of private areas of the automobile, which might require a reasonable suspicion that the ve-

hicle's occupants are armed (*see Michigan* v. *Long*, 77 L.Ed.2d 1201). This "search" was nothing more than a door opening followed by a brief physical entry consisting of the placing of a hand into the exposed areas of the car, which at worst had an incidental effect of presenting to police view a few locations near the floor of the car which might have otherwise remained unseen.

This "search" relating directly and exclusively to an examination of the VIN may be likened to the type of warrantless administrative inspection searches requiring no probable cause or reasonable suspicion which have been sustained by this Court in cases such as *Donovan* v. *Dewey*, 452 U.S. 594 (1981); *United States* v. *Biswell*, 406 U.S. 311 (1972), and *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970). *Compare United States* v. *Martinez-Fuerte*, 428 U.S. at 560-561. Because of the "pervasive" federal regulatory schemes applicable to the commercial enterprises involved in those cases, the extremely reduced expectations of privacy legitimately held by the subjects of the intrusion justified the warrantless and unsuspicioned searches. But automobiles too are known by the public to be the subject of "pervasive" federal and state regulation as well (*see California* v. *Carney*, 53 U.S.L.W. at 4523), and thus the observed commission of two traffic infractions reasonably justified the limited, directed intrusion of an administrative-type inspection of the VIN, which included a very minimal "search" of the sort that occurred here.

Ultimately, during the course of that patently reasonable "search," the officer inadvertently observed the butt of respondent's pistol in what was most akin to "plain view," as it was extending out from under the driver's seat into the common area of the automobile. Hence, the resulting seizure of the pistol was clearly justified. *See Texas* v. *Brown*, 460 U.S. 730; *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971).

C. Once respondent was lawfully stopped for a traffic infraction, his status as an unlicensed driver deprived him of any legitimate and reasonable expectation of privacy with respect to the passenger compartment of the automobile that might have served to prohibit a policeman's non-consensual entry.*

The decision of the New York Court of Appeals that respondent's Fourth Amendment rights were violated by the police officer's non-consensual opening of the automobile

* Although the arguments presented in subpoints C and D were not advanced below as a justification for the search of petitioner's vehicle, it is well settled that litigants before this Court may raise new or alternative theories in support of a federal issue raised in state court. *See Illinois* v. *Gates*, 462 U.S. 213, 76 L.Ed.2d 527, 554 (1983) (White, J., concurring) ("We have never suggested that the jurisdictional stipulations of § 1257 require that all arguments on behalf of, let alone in opposition to, a federal claim be raised and decided below."); *Fuller* v. *Oregon*, 417 U.S. 40, 58 (1974) (The Court may adopt alternative theories from those raised in state courts provided the federal question is not rendered "substantially different."); *Stanley* v. *Illinois*, 405 U.S. 645, 658 n.10 (1972) (The Court's method of analysis may differ from that utilized by the lower court); *Raley* v. *Ohio*, 360 U.S. 423, 437 n.12 (1959) (arguments may vary from those raised below); *Dewey* v. *Des Moines*, 173 U.S. 193, 198 (1899) ("Parties are not confined here to the same arguments which were advanced in the courts below upon a federal question there discussed."); *cf. Wilson* v. *Cook*, 327 U.S. 474, 483 (1946); *see also* R. Stern and E. Gressman *Supreme Court Practice* 230 (5th ed. 1978). Notwithstanding petitioner's newly advanced arguments, the essential question is unchanged from that raised in the lower courts and remains whether the police conduct was permissible under the Fourth Amendment. Only the method by which to analyze the lawfulness of that conduct has been altered. *See Scott* v. *United States*, 436 U.S. 128, 138 (1978) ("the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."). Thus, since these new arguments are derived from the question litigated below and have ample factual support in the record, there exists no impediment to this Court's consideration of them. *Cf. Illinois* v. *Gates*, *supra*, at 536-540 (The Court refused to entertain arguments advanced for a good faith exception to the exclusionary rule where the record was inadequate); *Steagald* v. *United States*, 451 U.S. 204, 210 n.5 (1981) (Court would not entertain a "standing" argument due to the inadequacy of the record on that issue).

door and "entry" into the passenger compartment (by reaching within), because it exposed "hidden areas" of the vehicle, is additionally untenable because of respondent's special status as an unlicensed driver. Regardless of what reasonable expectations of privacy might be asserted by the properly licensed driver as a bar to non-consensual police entry into the passenger compartment of a lawfully stopped vehicle, surely the unlicensed driver's reasonable expectations of privacy with respect to the passenger compartment, assuming the lawfulnesss of the initial stop, are substantially diminished. When dealing with an unlicensed driver, the police have not only the right but the obligation to assure that he does not re-enter the vehicle to operate it for even a moment longer.* Since licensing statutes exist to assure that drivers of motor vehicles are qualified to do so, persons operating vehicles without licenses must be presumed to be either unsafe or unqualified drivers. *See Delaware* v. *Prouse*, 440 U.S. 648, 659-660 (1979).

Concommitantly, the police officer will sometimes find it necessary to enter the vehicle either to move it personally from traffic, park it, or most frequently, to conduct an inventory search of the vehicle prior to its being towed from the roadway and impounded. *See, e.g., United States* v. *McCambridge*, 551 F.2d 865, 869-870 (1st Cir. 1977); *United States* v. *Griffin*, 729 F.2d 475, 480-481 (7th Cir.), *cert. denied* 83 L.Ed.2d 60 (1984); *United States* v. *Balanow*, 528 F.2d 923, 924 (7th Cir. 1976); *see also, South Dakota* v. *Opperman*, 428 U.S. 364, 369-372 (1976) (inventory search of impounded vehicle is reasonable under the Fourth Amendment).

Quite simply, as soon as respondent was lawfully pulled over for the traffic infractions he committed, he had to be aware that his status as an unlicensed driver would come to light, and that he would not be allowed to continue his opera-

* This argument concerning the unlicensed driver should apply with equal force to the situation involving the intoxicated driver, who is temporarily rendered unqualified to operate a motor vehicle by his drinking.

tion of the vehicle. He had to be charged with the reasonable expectation that there would be some degree of police intrusion into the interior of the automobile, occasioned at the very least by a police obligation to secure the vehicle against vandals who might damage the car after the officers removed respondent from the scene. That Officer McNamee was initially unaware of respondent's status as an unlicensed driver, and opened the door of the vehicle to inspect the VIN, is of no moment and in no way detracts from the ultimate conclusion that respondent had to know that the logical outcome of this police-citizen encounter would be a police entry into the vehicle. It was not the officer's knowledge but respondent's status as an unlicensed driver which served to reduce the expectations of privacy that he might reasonably maintain with respect to the interior of the vehicle.

As this Court has observed in a somewhat different context, an individual's "wrongful" presence on a premises deprives him of a "reasonable" expectation of privacy. *See Rakas* v. *Illinois*, 439 U.S. 128, 143-144 n.12 (1978); *Jones* v. *United States*, 362 U.S. 257, 267 (1960). The Court in *Rakas* considered it to be "inexplicabl[e]" that a few lower courts had allowed the possessor of a stolen car to contest the lawfulness of a police search of the automobile (439 U.S. at 141, n.9), and, indeed, the generally accepted rule is that a car thief, having the status of an unlawful, "wrongful" possessor of a vehicle, may have no reasonable expectation of privacy that would serve to bar a police search. *See, e.g., United States* v. *Hargrove*, 647 F.2d 411, 413 (4th Cir. 1981); *United States* v. *Pitts*, 588 F.2d 102, 103 (5th Cir.), *cert. denied*, 441 U.S. 948 (1979); *United States* v. *Hensel*, 672 F.2d 578 (6th Cir.), *cert. denied*, 457 U.S. 1107 (1982). Indeed, the Court of Appeals for the Second Circuit has extended this "wrongful" status concept even further by holding that an escaped prisoner has no reasonable expectation of privacy in an automobile being used by him to commit another crime, because his presence in free society is "wrongful." *United States* v. *Roy*, 734 F.2d 108,

110-111 2d Cir. 1984); *cf. Hudson* v. *Palmer*, 468 U.S. ——, 82 L.Ed.2d 393 (1984) (holding that an incarcerated prisoner has no reasonable expectation of privacy under the Fourth Amendment with respect to his prison cell).

Here, respondent was not a "wrongful" possessor of the vehicle he was driving in quite the same way that a thief might be. It would appear that the owner of the vehicle, respondent's brother-in-law (A. 32), had bestowed sufficient authority upon respondent for him to possess the car lawfully, in a general sense. Thus, if respondent had merely left the vehicle parked at a curb and used it as a repository for personal possessions that he kept in the trunk, in closed containers in the passenger compartment, or under the seats, it might well be that respondent could have been said to possess a reasonable expectation of privacy with respect to those items, thereby barring an unreasonable police search or seizure.

But when respondent chose to operate the vehicle unlawfully on the public highways, without a valid license, he assumed the status of "wrongful" operator, and his presence behind the steering wheel of this moving car was, indeed, a "wrongful" presence within those mobile "premises" as well. The police had to step in and assert their dominion and control over the vehicle to protect the general public from a presumptively unsafe driver.

That is not to say that respondent thereby relinquished every reasonable expectation of privacy that he had once possessed with respect to the car. Items kept in the trunk should not have been subject to police search, in the absence of a full inventory search attending an impoundment. The same might be said for closed containers within the passenger compartment.

However, to the extent that some "hidden areas" of the interior might now become observable because of a police entry into the vehicle, following a lawful traffic stop, it must

be concluded that respondent's reasonable expectations of privacy had been diminished to the point where he could no longer be allowed to complain of that entry. It would be illogical to expect that society would be willing to bar a limited police intrusion into the passenger area of a car that was stopped on the public roadway while being driven, in a dangerous manner by an unlicensed driver.

D. The search of respondent's vehicle incident to his seizure for a routine traffic violation was justified under *New York v. Belton*, 453 U.S. 454 (1981).*

Respondent's vehicle was stopped by police officers for the traffic violations of speeding and driving with a broken windshield. N.Y. Veh. & Traf. Law §§ 375(22), 1180(d) (McKinney 1984). During the attempt to inspect the vehicle's VIN, one of the officers recovered a loaded weapon found protruding from underneath the driver's seat. We believe that the officer's recovery of that weapon was justified under this Court's decision in *New York* v. *Belton*, 453 U.S. 454 (1981), as a result of a search incident to the initial seizure. Although that seizure did not rise to the level of a formal arrest as in *New York* v. *Belton*, *supra*, this was merely fortuitous because the officers were authorized by New York law to arrest respondent for those traffic violations, and the subsequently revealed traffic violation of driving without a license (N.Y. Veh. & Traf. Law § 509) (McKinney 1984). N.Y. Crim. Proc. Law § 140.10(2) (McKinney 1984); N.Y. Veh. & Traf. Law § 155 (McKinney 1984). Thus, the instant case fairly presents the question left open by this Court in *Michigan* v. *Long*, 463 U.S. 1032, 77 L.Ed.2d 1201, 1210 n.1 (1983), i.e., whether ". . . if probable cause to arrest exists, but the officers do not actually effect the arrest, . . . the police may nevertheless conduct a search as broad as those authorized by *Belton*** and

* See note, p. 34, *ante*.

** *New York* v. *Belton*, 453 U.S. 454.

Ross.'"* Petitioner submits that the risks inherent in a routine traffic stop are greater where the traffic offender is neither handcuffed nor arrested. Because a policy of *not* immediately arresting all traffic offenders summarily should be encouraged, those police officers choosing not to effect a full arrest, where a summons might appear initially to be a reasonable alternative, must not be placed in any greater jeopardy than the officer who is quick to arrest. Therefore, the officer who hesitates to arrest should be permitted a limited protective search of the stopped vehicle's passenger compartment.

In determining whether a routine traffic stop would have justified the ensuing search of respondent's vehicle, our analysis must, of necessity, commence with the case of *New York* v. *Belton*, 453 U.S. 454. In that case, a vehicle was stopped for speeding and, upon approaching the stopped vehicle, the police officer smelled burning marijuana and simultaneously noticed a marijuana envelope on the floor of the vehicle. *Id.* at 455-456. After placing the occupants under arrest, the officer searched the passenger compartment, recovering a quantity of cocaine from the zippered pocket of a leather jacket on the back seat. *Id.* The search of the passenger compartment was upheld on the theory that it was contemporaneous with and incident to the driver's lawful arrest. *Id.* at 460. Relying on *Chimel* v. *California*, 395 U.S. 752, 763 (1969), this Court reasoned that since the passenger compartment was within the area into which a motorist might reach, its search incident to that motorist's arrest was necessary to preserve the safety of the officer and prevent the destruction of evidence. *New York* v. *Belton*, 453 U.S. at 457, 460-461.

Although the search at issue in *Belton* was incident to an arrest for marijuana possession, the holding of that case would apply with equal force to searches incident to arrests

* *United States* v. *Ross*, 456 U.S. 798 (1982).

for routine traffic offenses.* *See Michigan* v. *Long*, 77 L.Ed.2d at 1210 n.1 ["... if the officers had arrested Long for speeding or for driving while intoxicated, they could have searched the passenger compartment under *New York* v. *Belton*, 453 U.S. 454, 69 L.Ed.2d 768, 101 S.Ct. 2860 (1981) ..."] (dicta); *United States* v. *Robinson*, 414 U.S. 218 (1973); *Gustafson* v. *Florida*, 414 U.S. 260 (1973) (both authorizing searches of motorists incident to their arrests for failure to produce drivers' licenses); *United States* v. *Mechanik*, 735 F.2d 136, 140 (4th Cir. 1984) (*Belton* search incident to arrest for "several violations of traffic laws"); *United States* v. *Marquez*, 687 F.2d 328, 330-331 (10th Cir. 1982) (*Belton* search incident to arrest for broken tail light); *see also Dyke* v. *Taylor Implement Co.*, 391 U.S. 216, 220 (1968) (leaving open the question of "[w]hether or not a car may constitutionally be searched 'incident' to arrest for a traffic offense ..."). The mere fact that searches incident to traffic arrests often lack an evidentiary justification is not determinative because

> [t]he justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial.

United States v. *Robinson*, 414 U.S. at 234; *Gustafson* v. *Florida*, 414 U.S. at 265. Certainly, the threat that a weapon might have been concealed in the passenger compartment exists irrespective of whether the arrest is based on marijuana possession, a traffic offense or some other

* Indeed, New York has chosen to punish certain traffic violations even more severely than simple, first offense marihuana possession. While "[u]nlawful possession of marihuana is a violation punishable only by a fine of not more than one hundred dollars" [N.Y. Penal Law § 221.05 (McKinney 1984)], persons driving in excess of the maximum speed limit "shall for a first conviction thereof be punished by a fine of not more than one hundred dollars *or by imprisonment for not more than thirty days* or by both such fine and imprisonment." N.Y. Veh. & Traf. Law § 1180(f) (McKinney 1984) (emphasis added).

offense.* *See United States* v. *Robinson*, 414 U.S. at 234 n.5 ("the danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest . . ."); *see also* LaFave, *Case-By-Case Adjudication Versus Standardized Procedures: The Robinson Dilemma*, 1974 Sup. Ct. Rev. 127, 151-52 (a search incident to an arrest for a traffic violation is based not on the likelihood of concealed weapons but on the danger to the officer if, in fact, such weapons are present). Thus, an arrest for a routine traffic violation justifies a search of the vehicle incident to that arrest.

In the instant case, however, respondent was not formally arrested for the traffic violation prior to the "search" of his vehicle. *Cf. Henry* v. *United States*, 361 U.S. 98, 103 (1959) (suggesting that an "arrest" occurred when the vehicle was first stopped); *Bailey* v. *United States*, 389 F.2d 305, 308 (D.C. Cir. 1967). Yet, while the intrusion engendered by the traffic stop might not have risen to the level of a formal arrest, it nevertheless constituted a "seizure" within the meaning of the Fourth Amendment [*Berkemer* v. *McCarty*, —— U.S. ——, 82 L.Ed.2d 317, 332-333 (1984); *Colorado* v. *Bannister*, 449 U.S. 1, 4 n.3 (1980); *Delaware* v. *Prouse*, 440 U.S. 648, 653 (1979)] and, thus, the search was incident to a "seizure" rather than an "arrest." *See Cupp* v. *Murphy*, 412 U.S. 291, 196 (1973) (up-

* Statistical evidence powerfully confirms the inherent dangers faced by police officers during routine traffic stops. In 1984, 72 officers were killed nationwide in the line of duty, 8 of them during traffic stops. *Source:* FBI, Press Release of May 12, 1985. Of the 80 police officers killed nationwide in the line of duty during 1983, 11 were killed during traffic stops and of the 1,031 officers killed nationwide during the period from 1974-1983, 129 were killed during traffic stops. Indeed, more police officers were killed in the course of traffic stops (129) than were killed "investigating suspicious persons and circumstances" (106). Statistics concerning officers assaulted during traffic stops are no less revealing. Of the 62,324 police officers assaulted nationwide in the line of duty during 1983, 6,210 of them were assaulted during traffic stops. *Source: Law Enforcement Officers Killed and Assaulted:* FBI Uniform Crime Reports—1983, pp. 17-19, 42-43.

holding a limited search under the respondent's fingernails where he had been seized rather than arrested).

The label applied to the initial intrusion should not, however, be determinative of the subsequent authority to search. In *Terry* v. *Ohio*, 392 U.S. 1, 16-19 (1968) this Court suggested that the authority of police officers to act should hinge not on "overly technical definition[s]", but "on the dangers and demands of the particular situation . . ." *Id.* at pp. 17-18 n.15. Since the traffic stop confrontation is fraught with danger regardless of whether it results in a formal arrest or lesser intrusion [*Michigan* v. *Long*, 77 L.Ed.2d at 1218-1219; *Pennsylvania* v. *Mimms*, 434 U.S. 106, 110 (1977); *United States* v. *Robinson*, 414 U.S. at 234], the arbitrary label applied to the intrusion or "seizure" should not impede the officer from insuring his safety through a protective search of the vehicle incident to that "seizure."

Such a conclusion is compelled not only by the risks inherent in a traffic stop, but by the fact that police officers have it within their discretion to elevate these mere traffic "seizures" into full custodial arrests. Because New York, like so many other states* authorizes the warrantless arrest

* States authorizing custodial arrests for routine traffic violations include: Alabama—*Rollins* v. *City of Birmingham*, 344 So.2d 200, 202 (Ala. App. 1977); Arizona—*see State* v. *Susko*, 114 Ariz. 547, 562 P.2d 720, 722 (Ariz. 1977) (en banc); Connecticut—*State* v. *Christian*, 189 Conn. 35, 454 A.2d 262, 264-265 (Conn. 1983); Delaware-Del. Code Ann. tit. 21 § 703 (a), (b)(1982); District of Columbia—*Punch* v. *United States*, 377 A.2d 1353, 1356 (D.C. 1977), *cert. denied*, 435 U.S. 955 (1978); Florida—*see Padron* v. *State*, 449 So.2d 811 (Fla. 1984); Illinois—*see City of Chicago* v. *Wender*, 46 Ill.2d 20, 262 N.E.2d 470 (Ill. 1970); Iowa—*State* v. *Streets*, 330 N.W.2d 3, 5 (Ia. 1983); Kansas—Kan. Stat. Ann. § 8-2105 (1983); Kentucky—*see McHone* v. *Commonwealth*, 576 S.W.2d 242, 243 (Ky. App. 1978); Louisiana—*see State* v. *Morgan*, 445 So.2d 50 (La. App. 1984); La. Code Crim. Proc. Ann. art. 213 (West 1984); Maine—Me. Rev. Stat. Ann. Tit. 15 § 704 (1984); Maryland—*see Jones* v. *State*, 56 Md. App. 101, 466 A.2d 895, 905 (Md. App. 1983); Massachusetts—Mass. Gen. Laws Ann. ch. 90, § 21 (West 1985); Michigan—*see People* v. *LeBeuf*, 93 Mich. App. 421, 286 N.W.2d

(footnote continued on next page)

of motorists stopped for violations of the vehicle and traffic law [N.Y. Crim. Proc. Law § 140.10(2) (McKinney 1984); N.Y. Veh. & Traf. Law § 155 (McKinney 1984); *People* v. *Pollaci*, 68 A.D.2d 71, 75, 416 N.Y.S.2d 34 (2d Dept. 1979); *cf. Hallenbeck* v. *City of Albany*, 99 A.D.2d 639, 472 N.Y.S.2d 187 (3d Dept. 1984)], the officers in the instant case could have first arrested respondent for the traffic violations of speeding [N.Y. Veh. & Traf. Law § 1180(d) (McKinney 1984)] driving with a broken windshield [N.Y. Veh. & Traf. Law § 375 (22) (McKinney 1984), and driving without a license [N.Y. Veh. & Traf. Law § 509 (McKinney 1984)] and then, incident to that arrest, searched the ve-

888, 889 (Mich. App. 1979); Minnesota—*Windschit'l* v. *Commissioner of Public Safety*, 355 N.W.2d 146, 148 (Minn. 1984); Missouri —Mo. Rev. Stat. § 43.195 (1969); New Jersey—*State* v. *Roberson*, 156 N.J. Super. 551, 384 A.2d 195, 196 (N.J. App. 1978); North Carolina—N.C. Gen. Stat. § 20-183 (a) (1983); North Dakota—*State* v. *Bergeron*, 326 N.W.2d 684 (N.D. 1982); Ohio—*State* v. *Rice*, 69 Ohio St.2d 422, 433 N.E.2d 175, 180 (Oh. 1982); Oklahoma—*Seher* v. *State*, 554 P.2d 66, 69 (Okl. App. 1976); Pennsylvania—*see Commonwealth* v. *Long*, 489 Pa. 369, 414 A.2d 113, 115 (Pa. 1980); South Carolina—*State* v. *Parker*, 271 S.C. 159, 245 S.E.2d 904, 905 (S.C. 1978); South Dakota—*State* v. *Halverson*, 277 N.W.2d 723, 725 (S.D. 1979); Texas—*Adams* v. *State*, 669 S.W.2d 391, 394 (Tex. App. 1984); Virginia—Va. Code § 46.1-178.01 (1984); Wisconsin—Wis. Stat. § 345.22 (1984). Among the states prohibiting custodial arrests for traffic violations are: California—*People* v. *McGaughran*, 159 Cal. Rptr. 191, 601 P.2d 207, 210 (Cal. 1979) (en banc); Colorado—*People* v. *Stark*, —— Colo. ——, 682 P.2d 1240, 1243 (Colo. App. 1984); Georgia—Ga. Code § 40-13-53 (1984); Oregon—Or. Rev. Stat. § 484.353(2)(a) (1985); Washington—*State* v. *Hehman*, 90 Wash.2d 45, 578 P.2d 527, 528 (Wash. 1978) (en banc). *See Berkemer* v. *McCarty*, —— U.S. ——, 82 L.Ed.2d 317, 333 n.26 (1984) [*citing* National Committee on Uniform Traffic Laws and Ordinances, Uniform Vehicle Code and Model Traffic Ordinance, §§ 16-203-16-206 (Supp. 1979) (advocating mandatory release on citation of all drivers except those charged with specified offenses, those who fail to furnish satisfactory self-identification, and those as to whom the officer has "reasonable and probable grounds to believe . . . will disregard a written promise to appear in court")]; *Gustafson* v. *Florida*, 414 U.S. at 266-267 (Stewart, J., concurring) ("It seems to me that a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments); Y. Kamisar, W. LaFave & J. Israel, *Modern Criminal Procedure* 402, n. a (5th ed. 1980).

hicle.* Petitioner submits that because the officers had probable cause to arrest respondent, their search of his vehicle was proper.

This conclusion flows directly from the holding of *New York* v. *Belton*, 453 U.S. 454. As previously stated, that case authorized the search of a vehicle incident to its occupant's arrest, based, in part, on the need to prevent that person from reaching for a weapon. *Id.* at 460. Yet, these safety concerns do not disappear in the traffic stop confrontation merely because the officer has chosen not to arrest the motorist. *See, generally Michigan* v. *Long*, 77 L.Ed.2d at 1218-1219; *Pennsylvania* v. *Mimms*, 434 U.S. at 110; *United States* v. *Robinson*, 414 U.S. at 234. Indeed, the need to prevent a motorist from reaching for a weapon is heightened where that motorist is in no way restrained, as was the respondent in *New York* v. *Belton*, 453 U.S. 454. *Cf. United States* v. *Cotton*, 751 F.2d 1146, 1148 (10th Cir. 1985); *United States* v. *Palumbo*, 735 F.2d 1095, 1097 (8th Cir.), *cert. denied*, —— U.S. ——, 83 L.Ed.2d 268 (1984)

* Although in *People* v. *Marsh*, 20 N.Y.2d 98, 281 N.Y.S.2d 789, 228 N.E.2d 783 (1967), the New York Constitution was construed as prohibiting searches of the *person* incident to arrests for traffic violations, that decision was grounded on the erroneous presumption that ". . . the officer who stops the speeder has not even the slightest cause for thinking that he is in danger of being assaulted." *Id.* at 101. In the years since *People* v. *Marsh*, *supra*, however, both this Court and the New York Court of Appeals have become all too aware of the dangers faced by police officers during traffic stops for such routine violations as speeding. *See* p. 40, n., *ante; Pennsylvania* v. *Mimms*, 434 U.S. at 110; *United States* v. *Robinson*, 414 U.S. at 234. In recognition of the dangers inherent in the routine traffic stop, the New York Court of Appeals has, since *Marsh*, interpreted the New York Constitution as permitting protective frisks of motorists incident to their arrests for traffic offenses. *See, e.g. People* v. *Ellis*, 62 N.Y.2d 393, 397, 477 N.Y.S.2d 106, 465 N.E.2d 826 (1984); *People* v. *Copeland*, 39 N.Y.2d 986, 387 N.Y.S.2d 234, 355 N.E.2d 288 (1976); *People* v. *Troiano*, 35 N.Y.2d 476, 478, 363 N.Y.S.2d 943, 323 N.E.2d 183 (1974). In any event, insofar as these cases concern searches of the motorists themselves, they are inapposite to the instant *vehicle* search incident to a routine traffic stop. That precise issue was intentionally left unresolved by the New York Court of Appeals as a matter of state constitutional law in *People* v. *Belton*, 55 N.Y.2d 49, 51, 447 N.Y.S.2d 873, 432 N.E.2d 745 (1982) (on remand from this Court).

(both holding that the fact that motorists were handcuffed at the time their vehicles were searched incident to their arrests was irrelevant under *Belton*). The motorist who remains at liberty while police officers concentrate on the routine administrative duties associated with the traffic stop, has unimpeded access to his vehicle and, consequently, to any weapons or dangerous instruments concealed therein. Obviously, the situation is more fluid where the motorist is not arrested and one need not possess a robust imagination to perceive of the potentially tragic consequences in such an unsettled atmosphere. Clearly then, an officer's need to preserve his safety is even more acute and, so too, his need to search the vehicle, where he chooses not to arrest the motorist for a traffic offense immediately.

The officer's need to preserve his own safety, however, should not have to be fulfilled by a requirement that he arrest all traffic offenders. Indeed, police officers should be encouraged, if possible, not to arrest traffic offenders who are, for the most part, law-abiding citizens. *See Berkemer* v. *McCarty*, 82 L.Ed.2d at 333, n.26 [*citing* National Committee on Uniform Traffic Laws and Ordinances, Uniform Vehicle Code and Model Traffic Ordinance §§ 16-203-16-206 (Supp. 1979) (advocating the issuance of summonses to drivers rather than their arrest)]. But, if such a policy is to be furthered, those officers evincing a proper regard for the liberty interests of motorists should not be required to assume the risk that those motorists are not law-abiding citizens. We can ill afford to penalize those conscientious officers choosing not to arrest traffic violators initially by preventing them from undertaking the same protective measures that would have been authorized had they first arrested those motorists. Thus, the worthy goal of deterring both needless traffic arrests and senseless traffic violence would be served through protective vehicle searches.

Moreover, aside from the legitimate policy interests furthered by protective searches, these searches should be authorized because, as a general principle, the power to search

emanates not from the arrest itself, but rather, from the probable cause to arrest. Although the search is generally justified as being "incident to an arrest," the arrest itself must be predicated on the existence of probable cause. *See Sibron* v. *New York*, 392 U.S. 40, 76-77 (1968) (Harlan, J., concurring) ("There is *no* case in which a respondent may validly say, 'Although the officer had a right to arrest me at the moment when he seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards'.") It is for this reason that a "search incident to arrest" may actually precede that arrest where probable cause existed from the outset and was not established as a result of the search. *See Rawlings* v. *Kentucky*, 448 U.S. 98, 110-111 (1980) ("Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa."); *United States* v. *Riggs*, 474 F.2d 699, 704 (2d Cir.), *cert. denied*, 414 U.S. 820 (1973); *United States* v. *Brown*, 463 F.2d 949, 950 (D.C. Cir. 1972). Applying this principle to the routine traffic stop situation it becomes clear that protective vehicle searches should be authorized.

Probable cause to arrest for the traffic violation exists from the outset and this probable cause, rather than the arrest itself should permit a "search incident to arrest," even though this search technically precedes any arrest. *See Rawlings* v. *Kentucky*, 448 U.S. at 111. Potential contraband recovered during the search may independently establish probable cause to arrest for a different crime, but since that contraband is not required to establish the initial probable cause to arrest for the traffic violation, the search nevertheless comes within the search incident to arrest exception. *See Rawlings* v. *Kentucky*, *supra*, at 111 n.6. Thus, the instant search of respondent's vehicle which preceded his actual arrest for weapon's possession was nevertheless "incident" to the probable cause to arrest for the numerous traffic violations, which existed from the outset. The search was, therefore, proper.

Having shown that an officer who chooses not to arrest a motorist for a traffic violation may nevertheless undertake a protective search of the vehicle, the question remains as to the scope of that search. Again, the answer is provided by *New York* v. *Belton*, 453 U.S. 454 wherein this Court limited the permissible search to the passenger compartment and any closed containers located therein, including the glove compartment, on the theory that these were the areas "into which an arrestee might reach in order to grab a weapon or evidentiary item." *New York* v. *Belton, supra*, at 460 (*quoting Chimel* v. *California*, 395 U.S. at 763). Since the search incident to a traffic seizure is similarly prompted by the risk of concealed weapons in the passenger compartment, its scope should be strictly limited to the passenger compartment and closed containers located therein, including the glove compartment.* A due regard for the legitimate privacy interests of the motorist, however, suggests that the scope of the search not extend to the person of the motorist.** Although the likelihood that a motorist stopped for a traffic violation will conceal a weapon on his person is comparable to the likelihood that he will conceal that weapon in the passenger compartment, we recognize that the physical integrity and legitimate privacy interests of the individual greatly exceed that of the automobile, in which a motorist can have only a limited expectation of privacy.† *See California* v. *Carney*, —— U.S. ——,

* Where, however, police officers have probable cause to believe that the trunk contains contraband, they may search it under this Court's holding in *United States* v. *Ross*, 456 U.S. 798 (1982).

** Where there are indicia that the motorist is either armed or dangerous, the officer may, of course, frisk that motorist. *See, e.g. Michigan* v. *Long*, 77 L.Ed.2d 1201; *Pennsylvania* v. *Mimms*, 434 U.S. 106.

† Notwithstanding this Court's holdings in *United States* v. *Robinson*, 414 U.S. 218 and *Gustafson* v. *Florida*, 414 U.S. 260 which authorized searches of individuals incident to their arrests for traffic violations, we submit that unlike vehicle searches, which should be authorized where traffic arrests are not made, a search of the individual is so much more intrusive and the routine traffic stop so common, that a formal arrest must remain as the prerequisite for a search of the individual.

53 U.S.L.W. 4521, 4523 (1985); *United States* v. *Chadwick*, 433 U.S. 1, 12 (1977); *South Dakota* v. *Opperman*, 428 U.S. 364, 367 (1976); *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) (plurality); *Cady* v. *Dombrowski*, 413 U.S. 433, 442 (1973). Moreover, insofar as the passenger compartment is, in large part, readily viewable to the outside world, [*Texas* v. *Brown*, 460 U.S. 730, 740-741 (1983); *Cardwell* v. *Lewis*, 417 U.S. at 590], the intrusion engendered by its search is clearly outweighed by the necessity of the officer to preserve his safety.

In urging this Court to adopt the position that police officers who forego the formal arrest of motorists may nevertheless search the passenger compartment of their vehicles, we are not unmindful that many motorists may be affected by these searches each year. *See Delaware* v. *Prouse*, 440 U.S. at 658 ("Vehicle stops for traffic violations occur countless times each day . . ."). The large number of motorists involved does not lend the gloss of "arbitrariness" or "harassment" to these searches, however, for their pre-requisite is always an offense which the particular state* has deemed sufficiently pernicious to warrant a full custodial arrest. *Cf. Delaware* v. *Prouse*, 440 U.S. at 663 (invalidating arbitrary vehicle spot checks); *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975) (invalidating arbitrary vehicle spot checks by border patrol agents). Thus, despite the common nature of the offense, the motorist must nevertheless break the law in order for his vehicle to be searched and this unyielding requirement insures that those motorists obeying the rules of the road need not fear indiscriminate searches of their vehicles.

Indeed, it is illogical to presume that police officers who, at present, are not using their power to arrest traffic offenders irresponsibly [*see Michigan* v. *Long*, 77 L.Ed.2d at 1210 n.1] will use their authority to effect protective vehicle searches incident to traffic stops not resulting in arrest

* See note, pp. 42-43, *ante*.

any less responsibly. Moreover, the risk that these protective searches will somehow become pretexts for the recovery of evidence is no more pronounced than the current risk that the traffic stop itself will become a mere pretext. In any event, we are confident that such aberrant police conduct will not only be detected, but amply deterred, through pre-trial suppression hearings which assess the officer's credibility. *See, generally United States* v. *Lefkowitz*, 285 U.S. 452, 467 (1932) ("An arrest may not be used as a pretext to search for evidence").

In sum, police officers lawfully stopping vehicles for traffic violations yet choosing not to arrest the drivers, should be permitted to undertake protective searches of the passenger compartments of those vehicles. By permitting such protective searches, this Court will not only stem the tragic tide of police deaths,* but will provide a "bright line" rule, easily understood and applied by police officers who must confront the traffic stop situation on a daily basis.** *See, e.g. Smith* v. *Illinois*, —— U.S. ——, 83 L.Ed. 2d 488, 495-496 (1984) (bright line rule that all questioning must cease upon a request for counsel); *New York* v. *Belton*, 453 U.S. at 458-460 (recognizing the need for a "workable rule"); *Baldasar* v. *Illinois*, 446 U.S. 222, 230 (1980) (Blackmun, J., concurring) ("bright line" approach to the right to counsel for misdemeanor offenses). Under such a bright line rule, it becomes clear that the weapon found underneath the driver's seat of respondent's vehicle following a traffic stop for speeding, was lawfully recovered.

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* *See* note, page 40, *ante*.

** The need for police guidance concerning the parameters of permissible conduct during a routine traffic stop was the basis for the petition for certiorari. Petition for Certiorari at pp. 5-6.

Conclusion

The judgment of the New York Court of Appeals should be reversed.

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